



Federal Communications Commission  
Washington, D.C. 20554

November 3, 2017

DA 17-1082

Mr. James Chelmowski  
6650 N. Northwest Hwy  
Chicago, IL 60631  
jchelmowski@comcast.net

Re: FOIA Control No. 2017-000903

Dear Mr. Chelmowski:

This is in response to your application for review<sup>1</sup> of the Office of General Counsel's (OGC) letter<sup>2</sup> estimating the fees associated with and requesting prepayment<sup>3</sup> for your FOIA request seeking "written FOIA Requester's Appeal withdraw letters or emails to document all those FOIA withdraws and withdraw/close dates" for 20 specified FOIA appeals.<sup>4</sup>

You raised the following arguments in your *Appeal* objecting to the *Fee Estimate Letter*:

1. "FCC FOIA search for 20 FOIA Appeal withdraw letters or emails does not require FCC staff with the highest pay grade of GS-15 (FCC staff with annual salaries more than \$131,767) and FOIA searches are required to be 'most efficient and least expensive manner.'
2. FCC FOIA search for 20 FOIA Appeal withdraw letters or emails does not require[] 5 hours of search time by FCC Staff with the highest GS-15 pay level and FCC grossly inflated FOIA search fees and search time to deny and/or discourage production.
3. FCC does not have legal authority to demand deadlines for payment without citing the appropriate legal statute. Then FCC Commissioners close the FOIA request approximately 3 days after receiving an email from Requester still interested and keep FOIA request open. All with no legal authority."

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<sup>1</sup> See E-mail from James Chelmowski to FOIA-Appeal@fcc.gov (Oct. 5, 2017) (*Appeal*).

<sup>2</sup> See Letter from Elizabeth Lyle, Assistant General Counsel, OGC, FCC, to James Chelmowski (Aug. 22, 2017) (*Fee Estimate Letter*).

<sup>3</sup> *Fee Estimate Letter* at 1 (citing 47 C.F.R. § 0.469(a)).

<sup>4</sup> See FOIAonline Filing, James Chelmowski, FOIA Request 2017-000903 (submitted and perfected Aug. 15, 2017) (*FOIA 2017-903*).

As explained below, we dismiss your application for review as repetitious and, on separate and independent grounds, as failing to articulate specific grounds for Commission review.

In the *Fee Estimate Letter*, OGC notified you that the applicable implementing regulations require the Commission to charge for all search time beyond the first two hours, that the estimated time to process *FOIA 2017-903* is five hours, and that the estimated fee for processing the request is \$257.61.<sup>5</sup> OGC also provided you with an explanation of how the estimated search fees were calculated.<sup>6</sup> OGC further notified you that, because the estimated fees associated with this request exceed \$250.00 and because you have no history of payment of FOIA fees, you were required to pay in advance the estimated fees before the Commission could process this FOIA request.<sup>7</sup> The *Fee Estimate Letter* gave you the opportunity to agree to the estimated fee of \$257.61, or to communicate with Commission staff on how to narrow your request to reduce potential processing fees associated with your request. The *Fee Estimate Letter* noted that if you did not exercise one of those two options by September 21, 2017, your request would be administratively closed. On September 22, 2017, you contacted the Commission directing that your request should be kept open. You did not agree to pay the estimated fee or narrow your request. On October 5, 2017, you filed your *Appeal* challenging the estimated search fees in *FOIA 2017-903*.

We conclude your *Appeal* is repetitious to appeals of previous FOIA requests<sup>8</sup> that you filed. The arguments you raise in your *Appeal* are substantively the same as those that you previously raised before the Commission and the District Court for the Northern District of Illinois, Eastern Division (District Court).

In your prior appeals of *FOIA 2016-345* and *FOIA 2016-665*,<sup>9</sup> you asserted that the estimated fees for those requests were “inflated” and “willfully excessive.”<sup>10</sup> As in your current *Appeal*,<sup>11</sup> you contended that the Commission was attempting to exaggerate the estimated fees in order to discourage requesters, and that the proposed search was not the “most efficient and least expensive manner” of conducting the search because of the grade levels of the Commission employees who would conduct the search and the time it

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<sup>5</sup> See *Fee Estimate Letter* at 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See FOIAonline Filing, James Chelmowski, FOIA Request 2015-000768 (submitted and perfected Sept. 11, 2015) (*FOIA 2015-768*); FOIAonline Filing, James Chelmowski, FOIA Request 2015-000769 (submitted and perfected Sept. 11, 2015) (*FOIA 2015-769*); FOIAonline Filing, James Chelmowski, FOIA Request 2016-000345 (submitted Feb. 10, 2016, and perfected Feb. 11, 2016) (*FOIA 2017-345*).

<sup>9</sup> On August 4, 2016, OGC responded to your administrative appeals in FOIA 2016-345 and 2016-665 by notifying you that OGC had determined that FOIA 2016-345 substantially overlaps with FOIA 2016-665, so the FCC consolidated its review of these two appeals. See letter from Elizabeth Lyle, Assistant General Counsel, OGC, FCC, to James Chelmowski (Aug. 4, 2016) (*August 4, 2016 FOIA Decision*).

<sup>10</sup> E-mail from James Chelmowski to FOIA-Appeal@fcc.gov (filed June 23, 2016) (*FOIA 2016-665 Appeal*).

<sup>11</sup> *Appeal* at 3-4.

would take them to do so.<sup>12</sup> The Commission responded to this argument in the *August 4, 2016 FOIA Decision*, explaining that the Commission “primarily employs highly trained attorneys, engineers, and economists, and therefore it is not surprising that employees at these pay scales are involved in this matter.”<sup>13</sup> Similarly, for *FOIA 2017-903*, we explained in the *Fee Estimate Letter* that the search for records and related search of FOIAonline would be undertaken by GS-15 staff in OGC. These GS-15 staff would be in possession of the pertinent records, as was the case for *FOIA 2016-345* and *FOIA 2016-665*. Additionally, the *Fee Estimate Letter* explained that staff estimated it would take approximately 15 minutes per record to search for and gather each of the records requested.<sup>14</sup> This estimate is reasonable and is not artificially inflated to dissuade requesters. Staff confirmed that the records requested are not kept in a single location, nor are they kept by a single staff member. Instead, multiple staff members would need to search their records individually for each of the 20 requested withdraw letters. Additionally, at least one staff member would need to search the Commission’s FOIA tracking system, FOIAonline, to determine the dates on which each particular appeal was withdrawn. This would require conducting 20 separate searches. Given the effort required to undertake such a search, 15 minutes per record, for a total of five hours of searching, is a reasonable estimate.

You sought review of the *August 4, 2016 FOIA Decision* in District Court, claiming that the Commission “demanded a 30 day deadline for Chelmowski to pay . . . illegal search fees.”<sup>15</sup> The District Court found in favor of the Commission and concluded that the Commission can require you to pay a search fee before processing FOIA requests.<sup>16</sup>

You subsequently filed *FOIA 2017-511*,<sup>17</sup> requesting documents substantially similar to those you requested in *FOIA 2016-345* and *FOIA 2016-665*. When the Commission presented you with an estimated fee for that search, you again appealed the Commission’s fee estimate.<sup>18</sup> As with your current *Appeal*, you contested the Commission’s ability to set deadlines related to FOIA processing, and demanded that the Commission provide its legal authority for setting such deadlines. The Commission issued an order on August 3, 2017, dismissing your *Appeal of FOIA 2017-511* for failure to articulate specific grounds for review.<sup>19</sup>

The *FOIA 2017-511 Order* explained that the “Commission has the authority to require advance payment of estimated FOIA fees where ‘the Commission estimates or

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<sup>12</sup> *Id.* at 3.

<sup>13</sup> *August 4, 2016 FOIA Decision* at 3.

<sup>14</sup> *Fee Estimate Letter* at 1.

<sup>15</sup> See Docket Entry 62, *Chelmowski v. FCC*, No. 1:16-cv-05587 (N.D. Ill. Mar. 10, 2017). You did not appeal that decision.

<sup>16</sup> *Id.*

<sup>17</sup> See FOIAonline Filing, James Chelmowski, FOIA Request 2017-000511 (submitted April 3, 2017, and perfected April 6, 2017) (*FOIA 2017-511*).

<sup>18</sup> *Appeal of FOIA 2017-511* (filed May 16, 2017).

<sup>19</sup> Letter from Brendan Carr, General Counsel, to James Chelmowski, 32 FCC Rcd 5804 (Aug. 3, 2017) (*FOIA 2017-511 Order*). You did not appeal that order.

determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00 and the requester has no history of payment.”<sup>20</sup> The *FOIA 2017-511 Order* also explained that “in exercising this authority under section 0.469(a) of the Commission’s rules, we are not ‘subject to or otherwise constrained by any prescribed time limitations with respect to requiring a response from a FOIA requester regarding the payment of an estimated search fee.’”<sup>21</sup> The *FOIA 2017-511 Order* also said that “30 calendar days is a reasonable period of time in which to request a response to the *FOIA Decision* before closing *FOIA 2017-511*.”<sup>22</sup> For *FOIA 2017-903*, the Commission provided you with 30 days to respond to the *Fee Estimate Letter*.<sup>23</sup> Given that you raise arguments that are substantively identical to those resolved in the *FOIA 2017-511 Order*, we conclude that your *Appeal* is repetitious of prior appeals you filed with the Commission.

Additionally, your *Appeal* is not a proper appeal under the Freedom of Information Act or Commission regulations, and does not articulate specific grounds for Commission review. The FOIA statute only provides that a requester can appeal an “adverse determination.”<sup>24</sup> A fee estimate is not a fee determination as contemplated by the Commission’s rules and therefore not an adverse determination that constitutes grounds for appeal.<sup>25</sup> We note, as we did in the *FOIA 2017-511 Order*, that the \$257.61 fee is only an estimate of the search fee that we may incur in processing *FOIA 2017-903*. The case law you cite in your *Appeal* supports the Commission’s position. The D.C. Circuit clearly states that an appeal of a fee estimate is “premature.”<sup>26</sup> In a separate but related action, the court found that the requester “constructively abandoned his request for documents by refusing to commit to pay for the searches he requested.”<sup>27</sup> Additionally, as explained above, your appeal is repetitious with at least three previous appeals that were resolved by the Commission and the District Court in favor of the Commission that you did not appeal. Therefore, we dismiss your application for review under section 0.251(j) of the Commission’s rules for being repetitious and for failing to articulate specific grounds for review.<sup>28</sup>

Even if we did not dismiss your *Appeal* as duplicative and also failing to articulate specific grounds for Commission review, we would conclude that the estimated fee is reasonable and that Commission staff properly closed your request. As explained in detail in the *Fee Estimate Letter* and above, the search for records responsive to *FOIA 2017-*

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<sup>20</sup> See 47 C.F.R. § 0.469(a); *FOIA 2017-511 Order* at 5, quoting letter from Brendan Carr, General Counsel, OGC, FCC, to Mr. Chelmowski, n.10 (May 25, 2017) (*May 25, 2017 Letter*).

<sup>21</sup> *FOIA 2017-511 Order*.

<sup>22</sup> *Id.*

<sup>23</sup> *Fee Estimate Letter* at 1.

<sup>24</sup> 5 U.S.C. 552(a)(6)(A).

<sup>25</sup> 47 C.F.R. § 0.461(j).

<sup>26</sup> *Hall v. CIA*, No. 04-0814 HHK, 2006 WL 197462, at \*4 (D.D.C. Jan. 25, 2006).

<sup>27</sup> *Id.* quoting *Hall v. CIA*, No. 98-1319, slip op. at 5 (D.D.C. Nov. 13, 2003).

<sup>28</sup> See 47 C.F.R. § 0.251(j) (as the Commission’s Chief FOIA Officer, “the General Counsel is delegated authority to dismiss FOIA applications for review that are untimely, repetitious, or fail to articulate specific grounds for review”).

903 would be conducted by attorneys over approximately five hours, two of which would be free. Additionally, your claim that the Commission closed your request despite receiving an e-mail that you were still interested in the request fails on two grounds. First, you did not contact the Commission until September 22, 2017, a day after the September 21, 2017 deadline provided to you in the *Fee Estimate Letter*. Second, your email reply<sup>29</sup> was not responsive to the *Fee Estimate Letter* because it did not “indicate a willingness to pay the estimated fee” or “narrow the scope of your request so as to fit within your authorized fees.”<sup>30</sup> As your response was untimely and nonresponsive, Commission staff members were justified in closing the request accordingly.<sup>31</sup>

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we notify you of the provisions for judicial review under paragraph (a)(4) of the Freedom of Information Act.<sup>32</sup> We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road–OGIS  
College Park, MD 20740-6001  
202-741-5770  
877-684-6448  
ogis@nara.gov  
ogis.archives.gov

Sincerely,

Thomas M. Johnson, Jr.  
General Counsel  
Office of General Counsel

cc: FOIA Officer

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<sup>29</sup> E-mail from Jim Chelmowski to Ryan Yates, Attorney Advisor, et al. (Sept. 22, 2017) (“These FOIA must remain open unless the FCC can provide the FOIA statute for any deadline.”)

<sup>30</sup> *Fee Estimate Letter*.

<sup>31</sup> *May 25, 2017 Letter* at 2.

<sup>32</sup> See 5 U.S.C. § 552(a)(4)(B) (“On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”)